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21 ALLIED MEDICAL AND DIAGNOSTIC SERVICES, LLC

22 DR. MUHAMMAD MIRZA and  
23 ALLIED MEDICAL AND DIAGNOSTIC  
24 SERVICES, LLC,

25 Subpoenaing Parties,

26 vs.

27 YELP, INC.,

28 Subpoenaed Party.

Case No.: 3:19-mc-80146-SK

(Case No. 1:18-cv-06232-LAP Pending in  
Southern District of New York)

**REPLY MEMORANDUM IN FURTHER  
SUPPORT OF MOTION TO ENFORCE  
COMPLIANCE WITH THIRD PARTY  
SUBPOENA**

Hearing Information

Date: TBD

Time: TBD

Courtroom: D

Judge: Hon. Sallie Kim

## PRELIMINARY STATEMENT

27 While Subpoenaed Party Yelp, Inc.'s ("Yelp's") memorandum in opposition  
28 ("Opposition") purports to identify purported deficiencies in Plaintiffs' subpoena and application,  
the only objection that Yelp addresses (abandoning all others) is a legal one: whether Plaintiffs

1 asserted *prima facie* causes of action for defamation and/or tortious interference under New York  
 2 law. Here, Plaintiffs not only have alleged the factual statements made by certain anonymous  
 3 John Does (the “Defamatory Reviews”) posted on the website Yelp.com (“Yelp”), but they have  
 4 also demonstrated, via unrebutted evidence, that those statements are false, defamatory and  
 5 damaging. On the whole, Yelp’s Opposition ignores the plain language of the Defamatory  
 6 Reviews, solely to support its fallacious argument that they were “non-actionable opinion.” On the  
 7 contrary, those statements that a board-certified physician is a “scam artist” and “fraud” **because**  
 8 he allegedly used filler “that was not filler,” “mixed” Botox with other products, including “water,”  
 9 in a manner that was unsanitary, unsafe and unlawful, are both provable factual assertions *and*  
 10 defamatory as to Plaintiffs. Yelp’s assertion otherwise lacks credulity. In fact, Yelp indeed  
 11 believes that Plaintiffs could and did meet the *prima facie* and evidentiary requirements of the  
 12 *Highfields* test as to the remaining Does because it provided information about three other Does—  
 13 when the reviews of those three other Does are nearly identical to the remaining Does that Yelp is  
 14 still withholding information about. In other words, Yelp does not believe its own argument and  
 15 nor should this Court. Finally, Yelp engages in circular reasoning concerning Plaintiffs’  
 16 demonstration of the false and damaging nature of these Defamatory Reviews by asserting that  
 17 Plaintiffs have not and cannot prove that they are false, because Yelp believes the statements are  
 18 protectable opinion—when they are not. In sum, Yelp’s selective refusal to comply with the  
 19 properly-supported subpoena should be admonished, and it should be required to provide the  
 20 limited, requested information immediately forthwith.

## 21 ARGUMENT

### 22 I. Plaintiffs Have Made A Prima Facie Showing Of Defamation *Per Se* and Yelp’s 23 Opposition Ignores the Defamatory Nature of Statements

24 As set forth in their opening brief, Plaintiffs have satisfied the first prong of the  
 25 *Highfields* “real evidentiary basis” test three times already: once prior to issuing the instant  
 26 subpoena in its application for expedited discovery before the Court in the underlying action,  
 27 again before Yelp during the parties’ conferral regarding Yelp’s non-compliance, and a third  
 28 time in their opening brief in support of the instant motion. Yelp’s Opposition demonstrates not

1 only a misreading of allegations of the Complaint, but also ignores the import of the Defamatory  
 2 Reviews themselves.

3 Nonetheless, regarding Plaintiffs' evidentiary showing, they provided Yelp (and the  
 4 Court), a copy of the Complaint (containing all the allegations of falsity and injury) and an  
 5 additional affidavit in support—nothing more should be required. *See Highfields Capital Mgmt.,*  
*6 LP v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *see also Yelp Inc. v. Superior Court*, 17  
 7 Cal.App.5th 1 (2017). Each of the Defamatory Reviews include provable facts that are capable of  
 8 defamatory meanings, and as such Plaintiffs' motion should be granted.

9 **First**, Yelp's Opposition cherry-picks the least actionable phrases from the Does' reviews  
 10 (some of which stretch paragraphs long) in an effort to hide the true defamatory nature of the  
 11 statements in context. The import of each of the challenged statements are that Dr. Mirza is a  
 12 "scam artist" and a "fraud," not in isolation, but because he allegedly uses and fills cosmetic  
 13 injections with either, "fake," "diluted," or "watered down" Botox, or some substance "he should  
 14 not," like "water," and defendants claimed to know these statements were true because they have  
 15 had Botox before and/or received treatment from other health professionals who use "real,"  
 16 "authentic" or "sterile" products. Simply because the reviewers expressed anger does not  
 17 automatically insulate their statements from being factual in nature, and to the extent those facts  
 18 are both false and damaging, as Plaintiffs allege, they are actionable. Why Yelp still believes  
 19 these statements are non-factual or not defamatory in nature under New York law is truly a  
 20 mystery.

21 **Second**, Yelp's own conduct demonstrates that Plaintiffs met their light burden to  
 22 demonstrate that the statements by the remaining Does are defamatory. As Yelp points out, it  
 23 previously provided information regarding 3 of the 11 John Doe Defendants, presumably because  
 24 it determined that Plaintiffs had made a *prima facie* showing of a claim for defamation as to those  
 25 reviews. *See* Mercer Decl. at ¶ 16, Exhibit G ("Yelp's Third Response"). While Plaintiffs  
 26 redacted those portions of Yelp's Third Response that provided personally-identifiable  
 27 information regarding the reviewers, they reproduced those portions that include the statements  
 28 (which were identified in Plaintiffs' Complaint) below:

1                   **Doe 1:**

2                   On September 15, 2017, John Doe #1, with the username "Lori M.," directed the  
3 authoring of a user review of Plaintiffs on Yelp.com as follows:

4                   I asked Dr Muhammad Mirza in a Cederhurst [sic] NY  
5                   location, why isn't he filling the syringe in front of me like  
6                   other Dr's I have gone to? He said he does it in advance to  
7                   save time, BS! All other Dr's do this in front of client. He  
                 is probably reusing product or diluting product!!! You can  
                 get all kinds of diseases this way!!!!

8                   See Mercer Decl. at Exhibit A at ¶¶ 20-21.

9                   **Doe 2:**

10                  On November 8, 2017, John Doe #2, with the username "Elena P.," directed the  
11 authoring of a user review of Plaintiffs on Yelp.com as follows:

12                  DON'T GO!!! I wish I red review before I go. Product fake  
13                  or diluted, does not give me any effect.

14                  See Mercer Decl. at Exhibit A at ¶¶ 27-28.

15                  **Doe 10:**

16                  On April 24, 2018, John Doe #10, with the username "Jay J.," directed the authoring of a  
17 user review of Plaintiffs on Yelp.com as follows:

18                  'DR' Muhammed Mirza.. This person is not a doctor.. He  
19                  has no medical qualifications. If you find out he graduated  
20                  from a hospital in the US or elsewhere, let me know! Please  
21                  do not imagine he'll do anything but rip you off. Charge  
22                  you massive fees to do nothing that is going to enhance  
23                  your beauty! Don't go near him.. He screwed me out of  
24                  \$1,000.. Pretending to put botox in my face. NO.. I have  
25                  blood under my skin from the needles he stuck into my face  
26                  .. And a massive headache. It never occurred to me that he  
27                  was unqualified, a rip off, a joke, a THIEF. Good grief how  
                  did this myth get started.. ? Groupon? Watch out for  
                  people like him! Believe me, he's not a physician! He's a  
                  wacko. Stay away. I will try to take him to court....But who  
                  knows if the process will allow me to get my money back?  
                  A lot of work and stress. Good luck to you all! Don't get  
                  ripped off people.

28                  See Mercer Decl. at Exhibit A at ¶¶ 83-84.

1       Yelp does not dispute that the above statements were defamatory in nature. *See*  
 2 Opposition at 4-5.<sup>1</sup> However, ironically, many of the same false tropes that appear in the above  
 3 statements *also* appear in the remaining Does statements—undermining Yelp’s argument that  
 4 they are non-actionable opinion. *Compare* Mercer Decl. at Exhibit A at ¶¶ 20-21, 27-28 and 83-  
 5 84 *with* Martz Decl. at Exhibit E.

6       For instance, Doe 3 a.k.a. “Doris B.”’s statements that Plaintiffs “put filler in my face that  
 7 was not filler” and that “he is a scam artis [sic], goes from one office to another [and] injects  
 8 things he should not” is not only defamatory by itself, but also mirrors the false allegations of  
 9 using “fake”, “diluted” or “pretend[ ] . . . Botox” that appeared in Doe 1, 2 and 10’s statements.  
 10 In sum, whether or not Dr. Mirza put “filler in [their] face that was not filler” or “injects things  
 11 he should not” is not opinion, but rather provably false facts.

12       Similarly, Doe 5 a.k.a. “Augustine S”’s statement that Dr. Mirza “[d]oesn’t fill the  
 13 syringe in front of [you]” mirrors Doe 1’s claim that he “isn’t . . . filing the syringe in front of me  
 14 like other Dr’s I have gone to.” Further, Doe 5’s references to the treatment lasting only one  
 15 month, also mirrors Doe 2’s claim that hers “didn’t even last for a month. SCAM!!!!.”  
 16 Moreover, Doe 5’s statement that “Botox is supposed to last of 3-6 months, [but] [i]t barely  
 17 lasted a month. No idea what he was ‘mixing’ it with,” implies that Doe 5 knows what genuine  
 18 Botox should be mixed with and how long it should last, suggesting that the version that Dr.  
 19 Mirza uses is not authentic or diluted. This is not opinion nor conjecture, and Yelp’s production  
 20 regarding Does 1 and 2 in response to Plaintiffs’ showing demonstrates as much.

21       Indeed, each of Doe 2 (which Yelp took no issue with), Doe 5, and Doe 6 repeat the false  
 22 trope that Plaintiffs’ Botox treatments failed to last a month, suggesting that Plaintiffs’ products  
 23 are anything but authentic, and calling them “scam artists” or a “scam”.

24       Further, Yelp’s claim that Dr. Mirza’s supplemental affidavit did not address Doe 3 and  
 25 8’s Reviews is not only a red herring, but misleading. First, as set forth above, Doe 3 and 8 make

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26       <sup>1</sup> Yelp’s claim that “Plaintiffs did not have a further . . . telephone discussion with Yelp’s counsel  
 27 after providing [Dr.] Mirza’s affidavit” in October 2018 is inaccurate. *See* Mercer Decl. at ¶ 15.  
 28 Specifically, counsel for Plaintiffs spoke to Yelp’s counsel, Ms. Martz, *again* on November 30,  
 2018 in an effort to resolve Yelp’s continued objections set forth in its November 26, 2018  
 email. *See id.*

1 many of the same allegations as do the other reviews (i.e. filler not filler and “watered down”  
 2 Botox)—Plaintiffs need not repeat the same allegations of falsity every time the same false  
 3 allegation appeared to meet its evidentiary burden. Second, if anything, Yelp misled Plaintiffs  
 4 into believing that Doe 3 and 8’s Reviews did not exist (*see* Mercer Decl. at Exhibit E)<sup>2</sup>—which  
 5 may be why Dr. Mirza’s affidavit excluded specific references to those reviews. However, to the  
 6 extent that the content of their reviews is the same as those other Reviews that Dr. Mirza  
 7 specifically addresses, the analysis here should be the same.

8 Next, the statements “Ashley W.” a.k.a. Doe 7 and “Ashley W.” a.k.a. Doe 8 should be  
 9 read and considered together, insofar as it appears that the same person authored both reviews  
 10 which were published less than one day apart. In any event, each of the reviews on its own  
 11 clearly imparts false facts concerning Plaintiffs’ professional hygiene and the authenticity of  
 12 their products—claims that Plaintiffs specifically address as false in both the Complaint, and  
 13 again in Dr. Mirza’s affidavit. Moreover, the trope of “diluted” i.e. “watered down” Botox from  
 14 Doe 8’s Review likewise appeared in Doe 1, 2 and 10.

15 Yelp’s selective criticism with Doe 9’s statements and claim that is nonactionable  
 16 opinion completely disregards what is alleged: Doe 9 claims that they went to Dr. Mirza and saw  
 17 no effects from Botox, had to go to a “real doctor” to receive Botox and it “worked the way it is  
 18 supposed to,” then surmises that Dr. Mirza is a scam and must have “water in those needles.”  
 19 This is not simply conjecture, as whether or not Dr. Mirza is a “real doctor” or injected Doe 9  
 20 with “water” and not Botox are provable facts—each of which Plaintiffs specifically addressed.

21 **Third**, again, each of the Does statements must not only be read in isolation, but in  
 22 context. The gravamen of the statements, which were published within a short period of time of  
 23 each other, and existed on Plaintiffs’ Yelp profiles contemporaneously is the false accusation that  
 24 Dr. Mirza practices and engages in “fraud” and is a “scam artist” not in a general sense, but by  
 25 *inter alia* using “fake Botox” and unlawfully mixing improper chemicals or “filler” with his

27 <sup>2</sup> Yelp’s Objection (e) to Request No. 1 states that “Yelp is unable to identify the relevant  
 28 account for Doris B. [Doe 3] based on the limited information provided in the Request. There is  
 also no review authored by “Ashley W.” [Doe 8] on March 29, 2018.” *See* Mercer Decl. at  
 Exhibit E.

1 injections for cosmetic applications and by not actually being a licensed medical doctor. *See*  
 2 SAC at ¶¶ 22-96 (Mercer Decl. at Exhibit B). The reviews played off of similar tropes and  
 3 echoed the other reviewers' accusations, which repeated the same statements. *See, e.g.* Mercer  
 4 Decl. at Exhibit B, SAC at ¶ 28 (Doe 2: "Agree with all negative comments. . . ."). In other  
 5 words, when a viewer read a particular John Doe's accusation of "scam artist" or "fraud" it was  
 6 not in a vacuum, but next to the other Does' accusations of "complete fraudulent scam artist"  
 7 behavior which included using "fake," "diluted," or "watered down" Botox. Each of the  
 8 statements could and did subject Plaintiffs to contempt and ridicule, while causing patients to  
 9 avoid seeing Plaintiffs—thereby injuring their business and Dr. Mirza's professional career. *See*  
 10 *Yelp Inc. v. Superior Court*, 17 Cal.App.5th 1 (2017) (Finding statements implying that work done  
 11 by the plaintiff, a licensed professional, did not comply with professional standards were  
 12 defamatory, and ordering Yelp to disclose the identity of the reviewer). Accordingly, Yelp should  
 13 be compelled to provide Plaintiffs with the requested information forthwith.

14 **II. Plaintiffs Will Continue to Be Harmed Absent Disclosure Of The Defamatory  
 15 Speakers' Identities**

16 As a threshold matter, contrary to Yelp's argument, defamatory speech is not  
 17 constitutionally-protected speech. *See OBI Pharma, Inc. v. Does 1-20*, Case No. 16-CV-2218 H  
 18 (BGS) (S.D. Cal. April 27, 2017). Further, Yelp's business goals and concerns are of no  
 19 moment—only the speakers' privacy rights are at issue. While Yelp may have limited standing  
 20 to assert such privacy rights on their behalf, the fact that Yelp may want to develop a platform  
 21 that encourages "helpful" reviews is not and should not be of concern to the Court in reviewing  
 22 whether the remaining Does herein made false and defamatory statements of fact about Plaintiffs  
 23 such that their contact information should be disclosed.

24 Further, as set forth above, Yelp was given and had access to a copy of the operative  
 25 complaint wherein Plaintiffs alleged and confirmed the harm begat by the Doe Defendants'  
 26 campaign of false statements. Yelp's argument that additional proof of same is not only  
 27 unwarranted, but not required by the *Highfields* test. Even if it were, Dr. Mirza's supplemental  
 28 affidavit should have and did cure any concerns Yelp might have had in contesting the allegations  
 of injury set forth in the Complaint. Finally, given the *per se* defamatory nature of the statements

1 at issue, Plaintiffs were not required to plead special damages or malice—but did so anyway.

2 Next, as stated in Plaintiffs' opening brief, the Does may not in fact, be “anonymous” in  
 3 the strictest sense and considering their privacy in the context of the First Amendment should, at  
 4 best, be limited in nature. Yelp's argument otherwise lacks basis in fact, and just because Yelp  
 5 permits users to use pseudonyms does not mean that they did. For instance, Yelp disclosed that  
 6 Doe 1 a.k.a. “Lori M.” provided name was “Lori Mehrkens” (see Mercer Decl. at Exhibit E), and  
 7 that was that person's real name (see Mercer Decl. at Exhibit B). Here, Plaintiffs' subpoena  
 8 simply seeks identifiable contact information, which it alleges not to have and only Yelp has (*see*  
 9 SAC at ¶8). It may be that the remaining Does did use their real names, like “Ashley” or “Katie”  
 10 but Plaintiffs should not be faced with the embarrassment and uncertainty of suing every patient  
 11 named Ashley or Katie they may have. Finally, even if the Does did use pseudonyms, for the  
 12 reasons set forth and discussed at length above, the defamatory nature of their statements both  
 13 vitiates any First Amendment protections they may have had, while also impeding Plaintiffs'  
 14 ability to seek judicial relief for same—absent disclosure from Yelp, which should be so ordered.

15 **CONCLUSION**

16 Based on the foregoing, and the papers submitted by Plaintiffs in connection with the same,  
 17 Plaintiff respectfully requests that this Court grant (i) their motion to enforce the subpoena on non-  
 18 party Yelp, and (ii) such other relief to Plaintiffs as the Court deems proper.

19  
 20 DATED this 20<sup>th</sup> day of June, 2019.

Respectfully submitted,

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